1. **1515554 (Migration) [2016] AATA 4715 (21 November 2016)**

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Gabriel Parpauta Ms Marcela Ifiodi
CASE NUMBER:	1515554
DIBP REFERENCE(S):	BCC2015/1260778
MEMBER:	Adrian Ho
DATE OF DECISION:	21 November 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Student (Temporary) (Class TU) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 572 Vocational Education and Training Sector visas: • Public Interest Criterion 4020 for the purposes of cl.572.224 of Schedule 2 to the Regulations.

Statement made on 21 November 2016 at 3:02pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 2 November 2015 to refuse to grant the applicants Student (Temporary) (Class TU) visas under s.65 of the *Migration Act 1958* (the Act).

6. The applicants applied for the visas on 2 November 2015. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.572.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations) which requires that Public Interest Criterion 4020 (PIC 4020) is met.

7. The applicants were represented in relation to the review by their registered migration agent.

8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.572.224 for the grant of the visa. Broadly speaking, this requires that:

    - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and

    - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and

    - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and

    - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

10. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

11. The term ‘information that is false or misleading in a material particular’ is defined in cl.4020(5) and the term ‘bogus document’ is defined in s.5(1) of the Act (see the attachment

to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

12. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

14. **The distinction between documents and information, and claims**

15. PIC 4020 is only concerned with documents, and whether they are bogus documents, and information, and whether that information is information that is false or misleading in a material particular.

16. PIC 4020 is not concerned with claims expressly or impliedly made by applicants per se, unless they are also contained in documents or contained in information. Information can be given in writing, and conceivably, though infrequently, given orally.

17. The applicant claimed in writing that he runs a business in Turin, Italy and he wished to study English so as to better interact with the tourists. He provided a certificate from Italy which was a title search for the business, which listed him as owner, and disclosed a registration date in 2010.

18. The certificate was investigated by the Department during which it was revealed that the business registration was cancelled in 2013 and the delegate concluded that the 'business is now closed and has been inactive since'.

19. The fact of whether the business was active and running was relevant to an assessment of whether the applicant intended to stay in Australia temporarily under cl.573.223(1)(a).

20. The business certificate

21. The business certificate does nothing more than record the details of a business in the applicant's name registered in 2010. Nothing in the document asserts that the business was still operational in 2015. Nothing in the Department investigation indicates that any of the information contained in the document is false or misleading or that it is a bogus document as defined in s.5.

22. What the Department received out of its investigation was information that the business registration was cancelled in 2013. That does not render the information in the original business certificate false or misleading, nor does it render that document a bogus document.

23. Nor does it in fact establish that the business was not operational; it may simply have been operating without registration or under a different registration.

24. The written claim

25. The written claim that implies that the business was still running in 2015 is contained in the written statement at DIBP file f.60 where it is made plain at the outset of the document that the applicant had help from a native English speaker in writing the document. That is, he did not write it himself and may not have been able to read what was written in it.

26. What was written with the help of an English speaker is 'I run a business in Turin' and that the applicant wished to study English giving him an edge over 'my competitors'. The statement goes on to relate that 'my wife and I, decided to take a break and have an experience in an English speaking country' and later 'I will go back to Italy and run my business'.

27. When confronted by the Department the applicant wrote a plain and transparent explanation which is at DIBP file f.51. He explains that he had poor representation from an agency called Yes Australia. He was plain in clarifying that the business was closed a month after he arrived in Australia so as to save on operational costs, when he decided to stay on to study. He relates that he intends to reopen the business when he returns, and retains the business registration for that purpose.

28. The tribunal considers that in the applicant's own mind he still regards himself as having a business in Turin, even though it is not registered and not trading. This is because on the evidence he may restart that business at any time upon return, and the only reason the business is not trading is because he is presently in Australia. On the evidence, he still regards himself as having competitors and regards his study of English as giving him an edge over those competitors. When it is written that he and his wife decided to 'take a break', on the evidence, that break is a break from running the business in Italy. There is therefore some suggestion in the written statement that the applicant is not running the business from Australia and, unless someone else is running the business for him while he is Australia (which is not suggested anywhere), it might be inferred that while the applicant is taking a break, the business is not trading.

29. On the whole, the tribunal considers that while the statement may give the impression that the business is trading, it is not free from doubt, not least because the applicant made clear that he himself did not write the statement which is in English.

30. The tribunal considers the applicant's subsequent written explanation to be transparent and the tribunal considers that the applicant did not intend to practice any fraud or deception.

31. Conclusion

32. For all of the above reasons, the tribunal finds the applicant has not relevantly given a bogus document or information false or misleading in a material particular to any of the individuals or entitles mentioned in PIC 4020(1). He therefore satisfies PIC 4020(1).

33. Other elements

34. There being no evidence to the contrary, the applicant satisfies cl.4020(2), 4020(2A) and 4020(2B).

35. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.572.224.

DECISION

36. The Tribunal remits the applications for Student (Temporary) (Class TU) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 572 Vocational Education and Training Sector visas:

    - Public Interest Criterion 4020 for the purposes of cl.572.224 of Schedule 2 to the Regulations.

Adrian Ho
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is ***false or misleading in a material particular*** means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

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